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NO. 86-1648

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, et al.,
Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents' repeated assertions that the decision below is "consistent with" or "identical to" those reached by the Fifth (Callejo v. Bancomer, S.A., 764 F.2d 1101 (1985)) and Sixth Circuits (Riedel v. Bancam, S.A., 792 F.2d 587 (1986)), and that those decisions therefore constitute an "unanimous, consistent body of circuit decisions" on the securities question are disingenuous. In fact, the Fifth Circuit in passing (footnote 33) simply accepted the Ninth Circuit's earlier ruling on the question (Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (1984); cert.den. 469 U.S. 1108) without an iota of independent analysis; and the Sixth Circuit never even reached the question because Riedel never raised it. Moreover, in Meason v. Bank of Miami, 652 F.2d 542 (1981); cert.den., 455 U.S. 939, the Fifth Circuit held that whether or not a foreign certificate of deposit was a

security depended upon its investment character. And in SEC v. First American Bank & Trust Co., 481 F.2d 673 (1973), the Eighth Circuit held that uninsured domestic "certificates of investment and passbook savings accounts" sold through the facilities of interstate commerce "are securities" for purposes of the Securities Act of 1933. Thus the decision below hardly represents the kind of "settled law" respondents would have this Court believe; it is entirely dependent upon an erroneous reading and application of Marine Bank v. Weaver, 455 U.S. 551 (1982)(see district court opinion in Wolf, supra, 549 F.Supp. 841 at 845, per Schwarzer, J., "Weaver ... does not compel the conclusion that Mexican banking laws obviate the application of the securities acts in this case."); but unless it is reviewed, it will surely become the law of the land.

In this age of world economic chaos, when the insolvency even of nations is not unheard of, it is both reasonable and desirable to regulate the marketing here of the deposit instruments of foreign banks. And it is entirely inconsistent with Weaver to exempt such instruments from the registration and disclosure requirements of the federal securities laws when those instruments are unregulated by any other federal laws.

Respondents' bland dismissal of the International Banking Act of 1978, 12 U.S.C. §§ 3102 et seq., as having "absolutely no application to the facts of this case" intentionally ignores those specific findings of the Congress that passed this legislation:

> ... [T]he need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of their [foreign banks] activities in the United States ...

S.R. 95-1073; reprinted in 1978 U.S. Code Cong. & Adm. News, 1422. Despite the court

of appeals' finding below that

> ... the banks solicited, marketed, and generally encouraged U.S. investors to deposit monies in their banks ... [and] engaged in a regular course of commercial conduct in the United states ...

Pet.App. pp. 13, 15, its holding that such activities are beyond domestic regulation violates the spirit of that Act and the letter of the Securities Act of 1933.

The decision below that the dollar depositors' rights in property were [protected by, but] not taken in violation of international law notwithstanding the failure to pay full compensation, is a decision of first impression, and presents a question of utmost importance. In none of the other so-called similar cases, Braka v. Bancomer, S.A., 762 F.2d 222 (CA2 1985); Callejo v. Bancomer, S.A., 764 F.2d 1101 (CA5 1985), were the claims brought or considered under the "taking" exception to sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(3), nor

was the explicit mandate of the second Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. §2370(e)(2), that the act of state defense shall not be applied in cases presenting such claims even addressed. In DeSanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (1985)(unmentioned by respondents), the Fifth Circuit did actually recognize but then sidestepped the question by holding that because the plaintiff there was a national of Nicaragua -- the taking state, she was not entitled to the protections of international law.

> Thus, even if Banco Central's actions might have violated international law had they been taken with respect to an alien's property, the fact that they were taken with respect to the intangible property rights of a Nicaraguan national means that they were outside the ambit of international law.

It seems clear the Fifth Circuit, despite its holding in Callejo, supra, would have little difficulty finding that a taking in violation of international law occurred

on the facts at bar.

Respondents' essential reliance upon sub dicta in a 4 to 3 state court opinion that has since been rejected by its own majority is chutzpatic but hardly persuasive on the question of whether the admitted failure to pay fair value for the confiscated dollar deposits was a violation of international law. Both J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168 (Ct.App.N.Y. 1975); cert.den., 96 S.Ct. 126; and Perez v. Chase Manhattan Bank, S.A., 463 N.E.2d 5 (Ct.App.N.Y. 1984), reached decisions contrary to that same court's earlier opinion in French v. Banco Nacional de Cuba, 242 N.E.2d 704 (Ct.App.N.Y. 1968), upon which respondents and the court of appeals rely. Even respondents' own expert, Dr. F.A. Mann said about French,

> It is to be hoped that in England the result would have been different.

Mann, The Legal Aspect of Money, 4th Ed. 418.

It is a part of the record below that the Banco de Mexico was given absolute discretion to set (or alter) the rates of exchange at which foreign currency obligations might be discharged. It set highly confiscatory rates that were absolutely unnecessary to the preservation of Mexico's foreign currency reserves, and unfair and offensive to the contractual and property rights of those U.S. citizens who had deposited their dollars in good faith and in the honest belief their rights to repayment in dollars would be honored. As Dr. Mann has written,

> It is fair and equitable treatment or, as it is sometimes put, good faith that every State is internationally required to display in its conduct towards aliens ... [W]hile normally the State is entitled at its discretion to regulate its monetary affairs, there comes a point when the exercise of such discretion so unreasonably or grossly offends against the alien's right to fair and equitable treatment ... that international law will intervene.

Mann, The Legal Aspect of Money 4th Ed., 476, 477. He concludes at page 530,

> These Agreements [protecting foreign investment] may lead to the acceptance of the broad principle of customary law and equity that a Government which has approved the importation of capital is bound to approve its re-exportation, that new capital invested in an economy with Government approval must be returned and profits arising from it must be remitted.

Application of this broad principle of customary law and equity is all the dollar depositors have ever asked.

All of the leading international authorities recognize that an agreement, valid and enforceable when made, cannot be rendered void by an intervening currency regulation; see, e.g., Mann, The Legal Aspect of Money 4th Ed., 376-378; 428-429; see also, Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F.Supp. 870 (S.D.N.Y. 1983). And, 2 Iran-U.S. Claims Tribunal Reports 340 (1983-I):

> Assuming that the License agreement between Kimberly and Novzohour did not comply with Iranian foreign exchange regulations in so far as it provided for payments in U.S. dollars, the Respondent has not proven that such a

> contractual provision was legally prohibited at the date when the contract was signed. Nor has it proven that the new foreign exchange regulations, when they were enacted, caused the contract to be null and void. Although Novzohour might have been prevented from transfering to Kimberly the payment of its debt in U.S. dollars, the existence and amount of the debt cannot seriously be disputed.

Just as the existence and the amount of the indebtedness of respondents to petitioners cannot seriously be disputed, any judgment in their favor would not even offend Mexico's exchange control regulations that do in fact permit the export of dollars. As a part of the record below, a Decree adopted December 10, 1982 provides,

> ... the Ministry of Finance shall proceed to repeal all provisions that have imposed restrictions on the export and import of foreign bank notes [bills] and bank notes of legal tender in the Mexican Republic to ensure the free international exchange of the aforementioned items.

Respondents finally rely upon Knox v. Lee, 12 Wall. 457-680 (1870) that held Congress had the constitutional power to make treasury

notes legal tender for the payment of debts. What respondents carefully omit to disclose is that Knox v. Lee also said Congress lacked the power to affect contracts to pay specific moneys -- as in the cases at bar, where the agreements specifically provide for the repayment of U.S. dollars upon maturity of the dollar-denominated deposit agreements. In describing the kind of contracts the Legal Tender Acts might validly affect, this Court said,

> We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.

20 S.Ct. at 311; 20 L.Ed. at 311.

And nowhere at all can any mention be found in respondents' brief of Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). If a foreign state's repudiation of a purely commercial obligation is neither an immune act of state nor subject to a claim of sovereign immunity, and is therefore

compensable, as this Court held in its plurality opinion in that case, then the repudiation here of the purely commercial obligations of the respondent banks to the dollar depositors must also be compensable.

For all of these as well as the reasons set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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